Petition

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81-1349

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DELLWAY VILLA OF TENNESSEE, LTD., *et al.*,
Petitioners,
v.
CHARLIE MAI JORDAN,
et al.,
Respondents

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the majority for the United States Court of Appeals for the Sixth Circuit erred by failing to affirm the District Court's delineation of the class?

PARTIES

1. Petitioners are Dellway Villa of Tennessee, Ltd.; L. H. Hardaway, Jr.; L. H. Hardaway, Sr.; Imperial Management Company; Rodman G. Lilly, Jr.; and Laura Notgrass.

2. Respondents are Charlie Mai Jordan and Vanessa R. Bush, Individually and on Behalf of All Other Persons Similarly Situated. The named respondents represent a class of persons who have allegedly been denied housing because of race at Dellway Villa Apartments.

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PETITION FOR WRIT OF CERTIORARI

Dellway Villa of Tennessee, Ltd.; L. H. Hardaway, Jr.; L. H. Hardaway, Sr.; Imperial Management Company; Rodman G. Lilly, Jr.; and Laura Notgrass petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unreported Opinion of the United States Court of Appeals for the Sixth Circuit was rendered on October 19, 1981, as attached hereto as Appendix A.

The unreported Opinion and Memorandum of the Honorable L. Clure Morton, Chief District Judge, upon which plaintiffs based their appeal was rendered on October 23, 1980, as attached hereto as Appendix B.

JURISDICTION

The judgment of the court below was entered on October 19, 1981. This petition is timely filed within ninety (90) days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

1. Rule 23 of the Federal Rules of Civil Procedure, as attached hereto as Appendix D.

STATEMENT OF THE CASE

Plaintiffs filed this class action lawsuit on February 28, 1979, pursuant to 42 U.S.C. § 1982 and § 3604, alleging that the defendants discriminated against black applicants by way of certain tenant selection policies and procedures at Dellway Villa Apartments in Nashville, Tennessee. Dellway Villa is a federally subsidized housing project intended to house families eligible for housing assistance payments pursuant to the provisions of Section 8 of the U.S. Housing Act of 1937, 42 U.S.C. § 1437(f). Maintenance of the suit as a class action is based upon Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. At the inception of this action 100 of the 244 units at Dellway Villa Apartments were rented, with the remaining units under construction.

Plaintiffs' motions for class certification and preliminary injunction were heard on June 5, 1979. The first stage of this bifurcated proceeding, which was limited to the issue of liability only, began on June 14, 1979. The case was tried in four days before Chief District Judge L. Clure Morton. On September 10, 1979, the court entered its memorandum opinion on the liability issue, finding all defendants guilty of discrimination in violation of 42 U.S.C. § 1982 and § 3604. On that same date the court entered an order certifying the class for damage purposes to consist of all blacks who had been or would be denied housing at Dellway Villa Apartments based on race.

A motion to clarify the class was filed by the plaintiffs on January 29, 1980. On February 22, 1980, the court issued an order which would allow only those qualified black applicants who were rejected to recover monetary damages. Plaintiffs subsequently moved for a reconsideration of that order. On March 10, 1980, the court defined the class entitled to monetary damages to consist of applicants who were discriminated against and who were qualified at the time of discrimination, but limited to the total number of apartments available.

On October 3, 1980, the plaintiffs moved for certification under Rule 54(b) of the court's September 3, 1980 order in regard to class limitation. The motion was granted on October 8, 1980, and an appropriate memorandum and order of final judgment was entered on October 23, 1980.

The plaintiffs appealed the district court's October 23, 1980, order defining the class of individuals allowed to proceed to the remedial phase to the United States Court of Appeals for the Sixth Circuit. On October 19, 1981, the court of appeals, with one judge dissenting, reversed the judgment of the district court limiting class recovery and remanded the cause for further proceedings.

REASONS FOR GRANTING THE PETITION

The United States Court Of Appeals For The Sixth Circuit Erred In Failing To Affirm The District Court's Limitation Of The Class Because District Courts Are Granted Broad Discretion In Class Actions Brought Pursuant To Rule 23(b)(2) Where Monetary Damages Are Sought; The District Court Did Not Abuse Its Discretion In Limiting The Size Of The Class.

This case involves the important question of the discretion afforded a district court judge in managing and supervising a class action suit brought pursuant to Federal Rule of Civil Procedure 23(b)(2) where monetary damages are sought.

Historically, district court judges have been afforded great flexibility in controlling the conduct of a class action. "Because class actions tend to be extremely complicated and protracted, their management and disposition frequently require the exercise of considerable judicial control and ingenuity in framing orders relating to various aspects of the case." 7A C. Wright and A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1791 (1972). The latitude accorded district courts is reflected in Federal Rule of Civil Procedure 23(d), which gives the trial court extensive discretion in formulating appropriate orders for supervision of the action. Rule 23(c)(3) of the Federal Rules of Civil Procedure describes the court's authority to delineate the class:

> "(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the Court finds to be members of the class."

The maintenance of a (b)(2) class action lawsuit that primarily seeks injunctive relief is a continuous task, and the court "has ample authority to reconsider its prior ruling on class certification as it pertains to the damage phase of this suit." *Griffin v.*

Harris, 83 F.R.D. 72, 74 (Pa. 1974) *rev. and rem on other grounds,* 571 F.2d 767 (3rd Cir. 1978). Manageability of the class at both the initial certification stage and when damages are individually determined is of paramount importance in promoting fairness and efficiency.

In Rule 23(b)(2) class actions where damages are sought, the broadest discretion should be granted to a district court judge. The reason for granting broad discretion to district court judges is that a Rule 23(b)(2) class action seeking monetary damages is actually a "hybrid" between a Rule 23(b)(2) and a Rule 23(b)(3) class action. 3B J. Moore, FEDERAL PRACTICE AND PROCEDURE ¶ 23.40 [4] (2d ed. 1978) (hereinafter referred to as Moore's Federal Practice). Rule 23(b)(2) provides as follows:

> "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, *thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."*
> (emphasis added)

As evident from the express wording of the rule itself, Rule 23(b)(2) was intended for use by parties seeking "injunctive or corresponding declaratory relief with respect to the class as a whole." The rule is not intended for use as a vehicle for the recovery of damages. Indeed, many cases have recognized the principle that (b)(2) was not intended to apply where the primary claim is for damages, but is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory. *See Lukenas v. Bryce's Mountain Resort, Inc.,* 538 F.2d 594, 595-96 (4th Cir. 1976). *See also* Moore's Federal Practice ¶ 23.40 [4]n. 2. Those cases which have allowed (b)(2) certification in a suit seeking damages have been cases where the relief sought is injunctive or declaratory, and monetary relief is either incidental or can be characterized as equitable in nature. *Robinson* v. *Lorillard,* 44 F.2d 791, 801-02 (4th Cir. 1971). *Lynch v. Sperry Rand Corp.,* 62 F.R.D. 78, 85 (S.D.N.Y. 1973). In sharp contrast to a Rule 23(b)(2) claim, a Rule 23(b)(3)

claim is intended for use for the recovery of damages, as evident from the strict notice requirements. *See* Moore's Federal Practice ¶ 23.40 [4]. In those cases in which damages have been sought in addition to an injunction or declaratory relief, the key inquiry of the courts has been whether the resulting hybrid case can be fairly and effectively managed. *Id.* Therefore, the broadest possible discretion should be afforded a district court judge in a case of this nature in order to insure effective management of the proceedings. In the present case, effective management necessarily would involve limitation of the class.

The United States Court of Appeals for the Sixth Circuit has implicitly recognized the necessity of allowing district court judges wide latitude in defining a Rule 23(b)(2) class when monetary damages are sought. In *Weathers v. Peters Realty Corp.*, 499 F.2d 1197 (6th Cir. 1974), the plaintiff brought a Rule 23(b)(2) action on behalf of all black citizens "who have been or will be seeking housing" at defendant's 13 unit apartment building. 499 F.2d at 1199. In the course of its opinion, the court outlined the requirements for maintaining such a 23(b)(2) class action and the policies behind limiting the class where monetary damages are sought. The court stated:

> "In attempting to define a (b)(2) class, it should be noted that the category may in some instances be quite broad in scope. The nature of the primary relief sought in this category, injunctive or declaratory relief, does not require that the class be as narrowly confined as under either (b)(1) or (b)(3). Of course some or all of the members of a (b)(2) class may seek additional relief, for example, monetary damages, as the present plaintiff has done. *When monetary damages are sought, the reason that district courts may see fit to confine the class more narrowly are, first, to protect the defendant in preparing his defenses against various damage claims, and second, to make the disposition of the class action more manageable since their evidence as to individual claims may vary widely in scope and character.*" (emphasis added)
>
> 499 F.2d at 1200.

The policies enunciated by the *Weathers* court underlying confinement of the class are directly applicable to the instant case. In addition to injunctive relief, plaintiffs have sought monetary damages. In their "Motion to Set Damages Awarded Guidelines," filed with the district court on October 3, 1980, and attached hereto as *Appendix* C, plaintiffs have asked that each and every class member be allowed to submit particularly individualized evidence of damages in the remedial phase of this case. Evidence as to individual claims would undoubtedly vary greatly. For reasons of judicial economy, the practical limitations of the district court,and the overwhelming burden placed upon defendants to conduct discovery as to each individual's claim for damages and to defend those claims in a single action, expansion of the class to the proportions sought by the plaintiffs is untenable.

As Circuit Judge Weick recognized in his dissent, manageablity is the key inquiry in delineating the size of the proposed class. The majority concluded that the district court limited the size of the recovering class for "substantive," as opposed to "procedural" reasons, thereby removing the district judge's discretionary arthority. *Appendix* A, page A-8. It is respectfully submitted that for purposes of management of a Rule (b)(2) action where monetary damages are sought, reasons which might be classified as "substantive" are not mutually exclusive from those which might be characterized as "procedural." As previously noted, when monetary damages are sought, one of the reasons that district courts may see fit to confine the class more narrowly is because "evidence as to individual claims may vary widely in scope and character." *Weathers, supra*. Any inquiry into "evidence as to individual claims" is necessarily a substantive one. Yet this is precisely the type of inquiry which must be made by a district judge for purposes of determining manageability. In his dissent, Circuit Judge Weick implicitly recognized the existence of the gray area between "substance" and "procedure" and the fallacy of the majority's rationale, concentrating instead on the concept of manageability. He stated:

> From a procedural standpoint alone, such class on its face was obviously unmanageable and the district court on that ground alone, in its discretion, had the right to limit the class . (citation omitted) *The district court chose to limit the class on substantive grounds and it is submitted that there was no abuse of discretion on the part of the court in so doing.* The individual members of such a large class in actions for damages would no doubt be asserting a multitude of conflicting divergent claims all of which would have to be tried in separate lawsuits and by a jury. (emphasis added)
>
> *Appendix* A, page A-17

Significantly, Judge Weick expressly found that the district court chose to limit the class on *substantive* grounds. Nevertheless, he refused to find an abuse of discretion on the part of the district court due to the burden imposed by requiring the district court to entertain "a multitude of conflicting divergent claims." *Id.*

Petitioners respectfully submit that Judge Weick was correct in finding that the district court did not abuse its discretion in limiting the class to manageable proportions. As the trial court found, the class would approximate 1,150 persons; trial of this case with each individual presenting his particular elements of damages could be extraordinarily long and would hamper even the most diligent judge's power to render appropriate relief. In terms of judicial economy, denial of this petition for a writ of certiorari would impose upon the district court protracted and unduly burdensome litigation.

In light of the foregoing, the petitioners respectfully submit that the majority for the court of appeals erred in finding that the district court improperly limited the size of the class.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

No. 80-5409

UNITED STATES COURT OF APPEALS
FOR THE THE SIXTH CIRCUIT

Charlie Mai Jordan, and Vanessa R. Bush, Individually and on behalf of all other persons similarly situated,
Plaintiffs-Appellants,

v.

Dellway Villa of Tenn., Ltd., L. H. Hardaway, Jr., L. H. Hardaway, Sr. Imperial Mgt. Co., et al.,
Defendents-Appellees.

On appeal from the United States District Court
for the Middle District of Tennessee.

Decided and Filed October 19, 1981.

Before: EDWARDS, Chief Judge, and WEICK AND KEITH, Circuit Judges.

KEITH, Circuit Judge, delivered the opinion of the Court in which EDWARDS, Chief Judge, joined. WEICK, Circuit Judge (pp. 15-19) filed a separate dissenting opinion.

KEITH, Circuit Judge. The plaintiffs filed this class action in district court pursuant to 42 U.S.C. §§ 1981, 2000(d), 3604 and 28 U.S.C. §§ 2201 *et seq.* They alleged that the owners and managers of the Dellway Villa Apartments in Nashville, Tennessee selected their tenants in a racially discriminatory manner.

The district court found the defendants "guilty of racial discrimination" under 42 U.S.C. §§ 1982 and 3604.

The issue on appeal is whether the district court properly limited the size of the class entitled to recover damages. We hold, for the reasons discussed below, that the size of the plaintiffs' class was improperly limited below and remand for further proceedings consist with this opinion.

I.

The Dellway Villa Apartment complex is located in Nashville, Tennessee. The complesx consists of 244 apartment units. Forty-eight of the units are one-bedroom apartments, 108 are two-bedroom apartments, and 88 are three-bedroom apartments. The apartment complex is a "Section 8 New Construction" project built to house families eligible for housing assistance payments under the provisions of Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437 (f).[1] Federal mortgage insurance was provided for the complex under 12 U.S.C. § 1715

The Dellway Villa Apartments are owned by Dellway Villa of Tennessee, Ltd. They are managed by the Imperial Management Company. Defendants L. H. Hardaway, Sr. and L. H. Hardaway, Jr. are partners of Dellway Villa of Tennessee, Ltd. and the sole partners of Imperial Management.

Defendant Rodman Lilly was the General Manager of Imperial Management Company from February 1977 to April 14, 1978. As general manager, he supervised the site managers of the various apartment complexes managed by Imperial. Defen-

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[1] 42 U.S.C. § 1437(f) provides in relevant part:

> For the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing, newly constructed, and substantially rehabilitated housing in accordance with the provisions of this section.

dant Laura Notgrass was one of the site managers supervised by Lilly during his tenure as general manager. She managed the Dellway Villa Apartments from August 1978 to February 17, 1979. From June 1978 to August 1978, Notgrass had also been responsible for tenant applications at Dellway Villa.

On February 28, 1979, the plaintiffs filed this suit on their own behalf and on behalf of all persons allegedly denied housing at the Dellway Villa Apartments because of the defendants' racially discriminatory tenant selection practices. At the time this suit was filed, 100 of the 244 rental units at Dellway Villa were rented. The rest of the units were still under construction. Of the 100 apartments that were rented, 82 were leased to white families and 18 were leased to black families. There were 1,622 applications for apartments at Dellway Villa. Of this number, 1,195 applications were filed by black families; 427 applications were filed by whites. Thus, although 70.9% of all applicants were black, only 18% received rental units.[2]

After trial, the district court found that

> [t]he site manager was not furnished any criteria for tenant

[2] In concluding that there were 1,622 applications filed for housing at Dellway Villa, the district court credited the defendants' answer to plaintiffs' interrogatories. *See* Findings of Fact and Conclusions of Law Regarding Class Certification, Appendix at 64. However, official U.S. Dept. of Housing and Urban Development (HUD) reports submitted during trial showed that approximately 4,000 applications were filed for Dellway Villa housing. Appendix at 300. Moreover, HUD official Raymand Young testified that a Dellway Villa staff member reported that 4,000 applications were on hand for apartments. Applicant Fran Dennis testified that Site Manager Appleton told her that 4,000 applications had been filed for Dellway Villa. Finally, rejection letters to five black Dellway Villa applicants bear the numbers 3130-3134 in sequence, indicating their place in the total number of apartment applications received at the complex. Thus, it is not clear from the record below how many applications were filed at Dellway Villa. For the purposes of this appeal, however, it is unnecessary to determine the precise number of applicants. The district court's finding of liability against the defendants is uncontested, and the propriety of the district court's order limiting class recovery does not rest on the potential number of plaintiffs' class members.

selection except to select the best available from those who qualified. The site manager was less than objective. She subsequently determined who she thought would be good tenants; *i.e.*, cause little trouble, not destroy property, exhibit a stable family, *etc.* In so doing, she made no attempt to evaluate the applications in order of date of receipt. In effect, she had no system to prevent preference of one person over another or white over black. Although she professed no racial bias in her selections, the court finds to the contrary. Her attitude can be best illustrated by her testimony in referring to a successful applicant that 'she [the applicant] begged for it humbly.' On one application, she [Ms. Notgrass] noted: 'Black, but nice: old, but nice looking, grey eyes and light skin.' She was discourteous to black applicants. She treated white applicants with respect. She planned to limit the number of black applicants in each unit. She could find available apartments for white applicants but not for blacks.

II.

In its September 10, 1979 Memorandum Opinion, the district court found that General Manager Lilly, Site Manager Notgrass and the Hardaways all violated 42 § 1982[1] and § 3604[4] by discriminating against black housing applicants at Dellway Villa. The court specifically found that "each of the defendants had personal knowledge of the process being used in tenant selection at Dellway Villa" and "by preferring later qualified white applicants over prior qualified black applicants, the dependants violated [the aforementioned] statutes."

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[1] 42 U.S.C. § 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

[4] The Fair Housing Act of 1968, 42 U.S.C. § 3604 provides:

As made applicable by section 3603 of this title and except as exempted by sections 3603 (b) and 3607 of this title, it shall be unlawful—

After finding the defendants liable under 42 U.S.C. § 1982 and § 3604, the district court then faced the task of formulating an appropriate remedy. The court found relevant the fact that

> in the past, the defendants Hardaway have had an excellant record in racial matters, that they are accepted by the black community as having contributed substantially in the training and employment field of disadvantaged blacks, and they have not been charged with racial bias in the operation of other subsidized housing. They have initiated training programs in the construction industry and have had a close working relationship with black academia.

The district court then enjoined the defendants from leasing additional units at Dellway Villa. It ordered the site manager to classify all 1,622 applications according to "bedroom requests," *i.e.* whether one, two or three bedrooms were desired by the applicant. Under the court order, the site manager would then compile chronological listings of the applications in each of

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(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, oran intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex or national origin that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

the three groupings. Attached to each list would be a photocopy of each application and a copy of the rating sheet prepared for each applicant.

On January 3, 1980, the district court ordered the defendants to select tenants in chronological order from the lists of qualified applicants compiled pursuant to the court's September 10, 1979 order. The court indicated that it intended to limit the number of class members that it would allow to prove and recover damages. Thus, plaintiffs filed a motion on January 29, 1980 to clarify the class members' eligibility for damages. The plaintiffs moved "that all black applicants for housing at Dellway Villa be determined to have been discriminated against and, therefore, eligible for damages because of the deliberate, systematic discrimination engaged in by the defendants." The district court responded to the motion by holding on February 22, 1980, that "any applicant who was discriminated against by [the] defendant[s] and who was qualified at the time of discrimination but limited to the total number of apartments available may recover."

The plaintiffs filed further motions for reconsideration of the limitation on class recovery. In a September 3, 1980 Memorandum Opinion, the court reiterated its position that only the number of class members which equaled the number of apartments available at the time of the filing of this suit would be permitted to recover damages. The court stated:

> To illustrate the reasoning of the court in this case, hypothetical situations may be helpful. Congress has not created a cause of action for solely intellectual discrimination. There must be action resulting in damages. In other words, racial bias alone is not enough. Suppose we have a person who has 50 apartments for rent. He is biased against blacks and does not intend to lease to them. He receives applications numbered 1 to 100. Numbers 1 to 47 are black and 48 to 100 are white. He leases to numbers 1 to 47. He has not been guilty of discrimination in housing.

The court further stated:

> [m]any, if not most, of the applications for renting were made prior to the completion of the construction. The number of the applications far exceeded the supply. The applicants had no knowledge of any discrimination practiced by defendants . . . Thus they could not have suffered any damages, emotional or otherwise, from the discriminatory acts of defendants unless they were actually deprived of housing. It thus appears logical that only those who would otherwise have received housing but for the discriminatory actions of defendants can recover damages in this case. To hold otherwise would enable all black citizens to recover damages from all individuals who harbored secret racial bias (without action thereon) against blacks. *Jordan* v. *Dellway Villa,* No. 79-3100 (M.D. Tenn., filed Sept. 3, 1980).

III

Under the district court's order limiting class recovery, a substantial number black persons who applied for housing at Dellway Villa would not be allowed to prove and recover monetary damages.[1] The appellees maintain that the district court acted properly in fashioning this order. They take this position because Fed. R. Civ. P. 23(b)(2) confers broad discretion on district courts to limit the size of classes which seek

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[1] Even if there are only 1,622 applications in the total Dellway Villa applicant pool, a great many of the black applicants in this pool would receive no recovery under the district court's order. There are only only 244 rental units at Dellway Villa Since about 90% of the total applicants are black most of them would not be in the "chronological position" to recover under the formula relied upon by the district court. If there are more than, 1,622 applicants, which appears likely, *See* footnote 2 *supra,* then under the district court's formula, even more black applicants would be prevented from proving and recovering damages.

recovery of monetary damages.[4] Upon close examination, however, we find the appellees' position on this issue without merit.

It is true that under Rule 23(b)(2) a "district court may see fit to define the class more narrowly . . . to protect the defendant in preparing his defenses against various damage claims and . . . to make disposition of the class action more manageable since the evidence as tgo individual claims may vary widley in scope and character." *Weathers* v. *Peters Realty Corp.*, 499 F.2d 1197 (6th Cir. 1974). However, as the appellees concede in their brief, "the district court [here] limited the size of the recovering class for *substantive* reasons" not for procedural reasons. Appellee's Brief at 5 (emphasis in original). In other words, since the district court in this case did not limit the size of the class recovery to insure sufficient manageability, *Weathers* v. *Peters Realty Corp., supra,* and other cases which recognize the discretion of a district court to limit class size to insure sufficient manageability, *See e.g. Fifth Avenue Peace Parade Committee* v. *Gray,* 480 F.2d 326, 330 n.5 (2d Cir. 1973), *cert. denied,* 415 U.S. 948 (1974); *Griffin* v. *Harris, supra,* have no application here.

We believe that the propriety of the district court's final order limiting class recovery rests upon whether those eligible to recover damages, under the order, include all of the members of plaintiffs' class who were actually denied housing at Dellway Villa because of their race. After an examination of the record, we must conclude that the district court's final order improperly exscludes persons who may have been denied housing at Dellway Villa because of unlawful discrimination.

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[4] Fed R. Civ. P. 23 (b)(2) provides as follows:

(b) Clas Actions Maintainable. An action may be maintained as a clas action if the prerequisites of subdivision (a) are satisfied and in addition . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to class as a whole . . .

The appellees assert that the district court's order was proper because the excluded class members cannot prove discrimination under *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973).[7] This contention, however, ignores the effect of the district court's finding of a "pattern or practice" of discrimination committed by the appellees against the plaintiffs' class – a finding that is unchallenged on appeal.

In *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), the Supreme Court recognized that although a showing of class-based discrimination is sufficient to support the entry of prospective relief, a district court usually must conduct additional proceedings to determine the proper scope of individual relief. In *Teamsters*, the Supreme Court specifically rejected the company's contention that when a court fashions a retroactive remedy, the individual claimants should bear the burden of showing either (1) that job vacancies existed at the time of application or (2) that the individual claimant possessed the requisite qualifications for the job. *Id.* at 358. The Court held:

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[7] In *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973), the Supreme Court held that a plaintiff in a disparate treatment Title VII case could establish a *prima facie* case by showing that: (1) he belongs to a protected class, (2) he applied and was qualified for a job for which the employer was seeking applicants, (3) despite qualifications, he was rejected, and (4) after his rejection, the position remained open and the employer continued to seek applicants with the plaintiff's qualifications. *Id.* at 802. The appellees in this case draw on an analogy of the Supreme Court's holding in *McDonnell Douglas* as support for the district court's order limiting class recovery. They assert that in order for a defendant to commit housing discrimination, "housing [must] in fact be available in cases in which there has not been a failure to accept applications or otherwise negotiate." Appellees Brief at 11. We think that this statement of law is correct. However, the problem in this case is that there were vacancies at Dellway Villa at the time the members of plaintiff's class filed their applications. Therefore, even if the class members have the burden of making out a *McDonnel Douglas* case of discrimination, which they to not, the district court's order would still be improper because the appellees continued to seek applications for apartments after the individual claimants filed applications.

> The proof of the pattern or practice [of employment discrimination] supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination. As in *Franks* [v. *Bowman Transportation Co.*, 424 U.S. 747 (1976)], the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons. *Id.* at 362 (citations and footnotes omitted).

Under *Teamsters*, an individual claimant can be denied recovery only if the proven discriminator meets its burden of showing that the claimant was rejected for lawful reasons. Thus in the remedial phase of this case the appellees have the burden of showing that either the individual members of plaintiffs' class were not qualified for an apartment at Dellway Villa or that there were no available apartments at the time the individual claimants filed applications.

On the facts of this case, the appellees will be unable to show that there were no available apartments for the members of plaintiffs' class. It is undisputed that vacancies existed at Dellway Villa even after the last member of this class filed an application for housing.[4] Therefore, contrary to the district

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[4] The first apartment to be rented at Dellway Villa weas leased on September 15, 1978. From that date until this lawsuit was filed, 100 apartments were rented as their construction was completed. Sixty-one more apartments were rented as their construction was completed. Sixty-one more apartments were rented by June 1979.

Since no applications were accepted at Dellway Villa after February 14, 1979, when this suit was filed all applications filed by the plaintiffs' class members were on hand when the 61 apartment units were rented out between the commencement and the trial of this lawsuit. In fact, the district court found that most of the applications were on hand by November 1978. Appendix at 54.

The district court found that as of September 10, 1979, "there [were] still a substantial number [of apartments] available for occupancy." Appendix at 59.

court's ruling, the appellees can only hope to avoid paying damages to the entire plaintiffs' class by showing that individual claimants were unqualified on the basis of pre-existing racially-neutral selection policies.[9]

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[9] It is not entirely clear from the record whether the appellees had any racially neutral selection factors in place prior to institution of this class action. Apparently prospective tenants had to have complete applications on file in order to qualify for housing at Dellway Villa. However, the district court found that "as a calculated course of conduct, defendants began notifying certain tenants that were not qualified because their applications were incomplete. Of course, 'only by chance,' this elementary process operated to eliminate 424 black applicants. A perusal of the applications of the successful white applicants reveals that the above action was an ill-calculated subterfuge in that their applications were in the main incomplete." Appendix at 54.

Income requirements were also apparently in effect at Dellway Villa. However, as Site Manager Notgrass' testimony revealed, this policy was apparently not applied in a racially neutral manner:

Q. And so, you screened the application first? and then had interviews . . .
A. Yes.
Q. . . . how did you verify the income of the applicants?
A. Sent an employment application to their place of work.
Q. All right. Did you do this for every single application?
A. No, at first, I was . . . I didn't know that I was supposed to do that, and I just gave it to the people that came in, and asked them to take it to their employer.
Q. That was your original procedure?
A. Yes.
Q. Did you give anybody . . .
A. Then I found out later that that was not the proper procedure.
Q. All right. What was the proper procedure?
A. To mail it to the Personnel Department of the company that . . . where they were employed.
Q. All right. Now, prior to learning the correct procedure, did you give that income verification form to all applicants who came in?
A. No.
Q. How did you decide which ones to give it to?
A. Well, only the ones that I could accommodate.
Q. What do you mean by that?
A. Only the ones that I would have a building ready, and after screening them, I would tell them that it looked like that their application would be approved and you known, I needed to get verification of their income.

The appellees maintain, and the district court concluded, that a number of the unsuccessful black applicants were not actually discriminated against and are not entitled to individual relief under *Teamsters.* In support of this conclusion, the district court reasoned that although there were vacancies at the time these class members filed their applications, no vacancies would have existed at that time if the appellees had processed in a non-discriminatory manner all the applications they received. In other words, since there are only 244 apartment units at Dellway Villa, only 244 members of plaintiffs's class can recover damages. This is because if the appellees has not discriminated against this group of 244, there would have been no vacancies for the others.

We cannot accept this analysis. We find no support in the law for the notion that defendant can discriminate against and be required to pay damages to only the number of applicants equal to the number of openings available. In fact, in *Carey* v. *Piphus,* 435 U.S. 247, 266 (1978), the Supreme Court recognized that emotional suffering and other actual damages, if shown, can be recovered for a constitutional violation, even if the ultimate decision would have been the same had constitutional procedures been followed.

More significantly, however, *Carey* held that when actual damages are not present, the victims of due process violations are still entitled to nominal recovery. *See Hughes* v. *Rowe,*—

Q. I see. So, before you learned the correct pro . . . did you still do that after you learned the correct procedure? Did you still wait on the mailing of the verification forms until after you'd screened the applications?

A. Yes.

Appendix at 163.

In the remedial hearings that the district court will conduct to determine the scope of each individual claimant's recovery, the appellees are nevertheless free to attempt to prove that an individual applicant would have been rejected on the basis of pre-existing racially-neutral policies. If the appellees make such a showing in any claimant's case, that claimant is not entitled to recover damages.

U.S.—, 101 S.Ct. 173 (1980); *McKenna* v. *Peeskill Housing Authority,* 647 F.2d 332 (2d Cir. 1981); *Morrow* v. *Igleburger,* 581 F.2d 767 (6th Cir. 1978), *cert. denied, 439 U.S. 1118 (1979).* Thus, under *Carey,* the individual claimants in this case are entitled to nominal recovery even if the appellees demonstrate, during the remedial phase of this litigation, that the claimants suffered no actual damages.

In addition, the plaintiffs correctly state in their brief that "damage awards must reflect what actually occurred, they must measure the plaintiffs' [actual] losses, not what would have transpired had [all] applications been processed fairly." Plaintiffs' Brief at 36.

In fashioning individual recovery, the court must determine what actually occurred in an individual claimant's case. *See Carey* v. *Piphus, supra* at 254-255 ("The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty") (emphasis in original) (*quoting* 2 F. Harper & F. James, LAW OF TORTS § 25.1 at 1299 (1956)). *See also* D. Dobbs, LAW OF REMEDIES § 3.1 at 135-138 (1973); W.Prosser, LAW OF TORTS § 2 at 7 (4th ed. 1971); C. McCormick, LAW OF DAMAGES § 1 (1935). If race played a part in the claimant's denial, then recovery of damages is mandated. *See Curtis* v. *Loether,* 415 U.S. 189, 197 (1974); *U.S.* v. *Mitchell,* 580 F.2d 789, 791 (5th Cir. 1978) ("if race was a consideration and played some role in the real estate transaction," a Title VIII violation is established). *See also McDonald* v. *Verble,* 622 F.2d 1032 (2d Cir. 1979); *Wang Lake Maxinhall Estates, Inc.,* 531 F.2d 832 (7th Cir. 1976); *United States* v. *Pelzer Realty Co.,* 484 F.2d 438 (5th Cir. 1973), *cert. denied,* 416 U.S. 936 (1974). Hypothetical factors are irrelevant to this inquiry. Accordingly, courts are not to erect hypothetical constructs of what might have happened in each individual class member's case had the defendant not discriminated against the entire class.

We believe that the only relevant factors in determining

"what actually occurred" are (1) the pre-existing policies of the defendant, (2) the actions actually taken by the defendant pursuant to those policies, and (3) the impact of those actions on the individual claimants. If, based on these factors, a district court finds that the defendant would have treated the claimant the same way had the claimant been white, then individual recovery in that case is not warranted.

In the instant case, the district court excluded a number of plaintiffs' class members from recovery, not because white applicants would also have been rejected if they had filed applications at the same time the excluded class members applied, but because there would have been no room at Dellway Villa if the defendants had applied a racially neutral chronological selection system to the entire class.[10] As previously stated, this kind of speculative analysis is an insufficient basis for denying individual recovery. We believe the hypothesis used by the district court to limit class recovery in this case is irrelevant to determining whether race played a role in the rejection of applications filed by the individual claimants.

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[10] The appellees argue that [b]y arranging the applications in chronological order and redetermining whether each applicant was indeed qualified, [the district court determined] which applicants [were] denied housing on account of illegal discrimination." Appellees Brief at 13. Thus, the district court would appear to have been properly carrying out its duty under *Teamsters* of determining if the individual claimants had in fact been treated differently and were entitled to recovery. However, this reshuffling of applications in no way revealed what actually happened in any of the claimants' individual cases. For example, the district court found that "[f]rom June 1977 until June 1978 hundreds of applications were accepted and placed in a filing cabinet. They were not separated as to size or date, nor were they alphabetized . . . Beginning in August 1978, the applications which specified race were separated into three categories, according to number of bedrooms requested . . . However, there was no effort to establish an order of preference based on date of application or date of receipt." Appendix at 52. Therefore, the district court's analysis based on the chronology of the Dellway Villa applications is pure hypothesis. There was no evidence that the appellees employed a chronological selection system, and the district court specifically found that they did not. Chronology simply had nothing to do with the rejection of any of plaintiffs' class members by the appellees. Accordingly, the district court's reliance on this factor in fashioning its limitation of class recovery order was improper.

The critical issue in determining eligibility for recovery of damages in this case is whether an individual applicant was actually discriminated against by the defendants, not whether an individual applicant would have been able to rent an apartment at Dellway Villa if all applications had been processed fairly. Accordingly, the judgment of the district court limiting class recovery is reversed. This case is remanded for further proceedings consistent with this opinion.

WEICK, Circuit Judge, dissenting: I respectfully dissent. Appellants have appealed to this court from an interlocutory order of the district court certifying a class entered on October 30, 1980, after a four day trial of a class action for injunctive relief and for monetary damages for racial discrimination in the rental of apartment units. The court adopted findings of fact and conclusions of law in a memorandum opinion and which certified the class and an interlocutory appeal and entered finl judgment thereon from which order certifying the class the appeal was taken.

The class was certified under Rules 23(a) and 23(b)(4) as follows:

> 3. Because the requirements of Rule 23(a) and 23(b)(2) are met by the plaintiffs, this action shall be certified as a class action. The class consists of all black persons who have been, or will be, denied housing at the Dellway Villa Apartments, 2533 Dickerson Road, Nashville, Tennessee, because of their race.

On January 3, 1980, the court entered the following order:

> It appearing to the Court as evidenced by the signatures of counsel for the parties that vacant apartments at Dellway Villa Apartments should be filled and that the tenants for existing vacancies should be chosen from the attached lists,
>
> IT IS THEREFORE ORDERED that the Defendants and

their agents shall fill vacant apartments at Dellway Villa apartments in chronological order from the names on the attached lists. Contact with applicants may be made by telephone and/or mail. When an applicant cannot be reached, counsel for Plaintiffs shall be notified and counsel for Plaintiffs will be given a reasonable amount of time not to exceed one week to make a search for the applicant.

IT IS FURTHER ORDERED that all records and files of tenants and applicants may be returned to the office of Dellway Villa Apartments.

IT IS FURTHER ORDERED that the Defendants and their agents shall not be required to take applications from prospective tenants at Dellway Villa Apartments until further Orders from this Court.

All other matters are hereby reserved.

This order was stipulated for the parties.

The complaint filed in the district court sought not only injunctive relief but also monetary damages on behalf of a class of black persons who claimed racial discrimination in the rental of the apartment units. Only 100 of the 244 units to be constructed had been completed for occupancy at the time the complaint was filed.[1]

The district court entered an injunction against any future discrimination in the rental of the units.

The issue on appeal is whether the limitation on the class embodied in the order of the district court certifying the class should have been extended so as to include 1000 or more addi-

[1] Three of the units had been reserved for housing of the management. Some units had already been rented to white families before any black applications had been received.

tional black persons who had made application to rent the apartments. They obviously could not all be accommodated because there were not enough apartments to go around. Furthermore, these additional persons were not on the list stipulated by the parties.

According to the findings of the trial judge, there were 1151 applications filed by black and 473 by white families or a total of 1624 applications for the rental of only 244 units of the apartments.[2] As of June 5, 1979, 103 of the 160 apartments rented, were rented to white tenants and 59 to black tenants.

Even if there initially had been some discrimination as found by the district court, it would have been impossible for the owners of the apartments to have accommodated all of the 1151 black applications and certainly not 4000 in 244 apartment units and there were 473 white applicants who were not without rights.

From a procedural standpoint alone, such class on its face was obviously unmanageable and the district court on that ground alone, in its discretion, had the right to limit the class. *Weathers* v. *Peters Realty Corp.*, 449 F. 2d 1197 (6th Cir. 1974). The district court chose to limit the class on substantive grounds and it is submitted that there was no abuse of discretion on the part of the court in so doing. The individual members of such a large class in actions for damages would no doubt be asserting a multitude of conflicting divergent claims all of which would have to be tried in separate lawsuits and by a jury.

The plantiffs filed a motion in the district court for reconsideration of the class certification which the court denied in the following memorandum and an order entered there.

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[2] There was hearsay evidence that as many as 4000 black persons were interested in renting the apartments, but aside from the unmanageability of such a large class, it was impossible to provide for them in only 244 units of which only 100 were ready for occupancy at the time the complaint was filed

The plantiffs' attorneys have again requested the court to consider its previous determination of the class. The limitation of the court was that only that number of qualified black applicants who would have received apartments but for defendant's actions can recover. Plantiffs assert that all blacks who filed applications and were denied apartments suffered discriminatory treatment and are entitled to recover damanges.

To illustrate the reasoning of the court in this case, hypothetical situations may be helpful. At the inception, Congress has not created a cause of action for solely intellectual discrimination. There must be action resulting in damages. In other words, racial bias alone is not enough. Suppose we have a person who has 50 apartments for rent. He is biased against blacks and does not intend to lease to them. He receives applicants numbered 1 to 100. Numbers 1 to 47 are black and 48 to 100 are white. He leases to numbers 1 to 47. He has not been guilty of discrimination in housing.

In the case sub judice a great many, if not most, of the applicants for renting were made prior to the completion of the construction. The number of the applications far exceeded the supply. The applicants had no knowledge of any discrimination practiced by defendants. The credible proof clearly supports this finding. Except for their disappointment in failing to obtain housing in this unique experiment, they had no actual knowledge of the number, identity, race or qualification of those individuals whose applications predated their own. Thus they could not have suffered any damages, emotional or otherwise, from the discriminatory acts of defendants unless they were actually deprived of housing. It thus appears logical that only those who would otherwise have received housing but for the discriminatory actions of defendants can recover damages in this case. To hold otherwise would enable all blacks citizens to recover damages from all individuals who har-

bored secret racial bias (without action thereon) against blacks.

An appropriate order will be entered overruling plaintiffs' motion.

The final judgment entered by the court adopted the previous order detailed above.

The district court did not abuse its discretion in limiting the class to manageable portions and if 4000 persons decided to file separate suits for damages triable by a jury because they were not able to rent the 244 available apartments, there is nothing to prohibit them from filing such suits. It is not believed that the apartment owners owe any duty of are under any obligation to construct additional apartment units to accommodate all of the 4000 applicants.

This findings of fact adopted by the district court were supported by substantial evidence and are not clearly erroneous. Its conclusions of law were correct.

The judgment of the district court certifying the class should be affirmed.

APPENDIX B

No. 79-3100-NACV

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

Charlie Mai Jordan, and Vanessa R. Bush, Individually and on behalf of all other persons similarly situated,
Plaintiffs,

v.

Dellway Villa of Tenn., Ltd., et al.,
Defendents.

(Filed October 23, 1980.)

ORDER

In accordance with the memorandum contemporaneously filed, this Court hereby expressly directs the entry of a final judgment of no damages and no recovery for race discrimination in housing for all black applicants at the Dellway Villa Apartments, 2533 Dickerson Road, Nashville, Tennessee, who are not among the first 48 qualified applicants for a one bedroom apartment, the first 108 qualified applicants for a two-bedroom apartment, and the first 88 qualified applicants for a three-bedroom apartment. This Court further has expressly determined that there is no just reason for delay in the entry of this Order of Final Judgment.

/s/ L. Clure Morton

No. 79-3100-NACV

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

Charlie Mai Jordan, and Vanessa R. Bush, Individually and on behalf of all other persons similarly situated,
Plaintiffs,

v.

Dellway Villa of Tenn., Ltd., et al.,
Defendents.

(Filed October 23, 1980.)

MEMORANDUM OF FINAL JUDGMENT

I

On September 3, 1980, this Court denied the plantiffs' motion, filed July 28, 1980, for reconsideration of the limit on the number of class members allowed to prove and recover damages that it imposed by its earlier order of March 10, 1980. In denying the July 28 Motion, this Court found, in a memorandum supporting its denial of that motion, that:

> In the case sub judice a great many, if not most of the applications for renting were made prior to the completion of the construction. The number of applications far exceeded the supply. The applicants had no knowledge of any discrimination practiced by defendants. The credible proof clearly supports this finding. Except for their disappointment in failing to obtain housing in this unique experiment, they had no actual knowledge of the number, identity, race or qualification of those individuals whose applications predated their own. Thus, they could not have

suffered any damages emotional or otherwise, from the discriminatory acts of defendants unless they were actually deprived of housing. It thus appears logical that only those who would otherwise have received housing but for the discriminatory actions of defendants can recover damages in this case. To hold otherwise would enable all black citizens to recover damages from all individuals who harbored secret racial bias (without action thereon) against blacks.

This Court hereby finds that the memorandum and order entered herein on September 3, 1980, constitute a final judgment of no damages and no recovery as to those claims of black Dellway Villa applicants who, by virtue of the dates of their applications, would not have been in the chronological position to have been rented an apartment there during the period of unremedied discrimination herein. For the reasons set forth below, this Court further expressly directs the entry of final judgment of no damages and no recovery as to those claims described above. This Court also expressly finds that there is no just reason for delay in the entry of this Order of Final Judgment.

II.

In the course of this class action for remediation of race discrimination in housing, this Court determined on September 3, 1980, that the only black Dellway Villa applicants who can recover damages are "those who would have otherwise received housing but for the discriminatory actions of defendants." This Court has found that these defendants intentionally chose later-applying white applicants to fill apartments at Dellway Villa prior to the trial of this lawsuit. This constitutes race discrimination in housing as to those previously-applying, qualified black applicants. Therefore, all black applicants among the first 48 one-bedroom applicants, the first 108 two-bedroom applicants, and the first 88 three-bedroom applicants at the Dellway Villa Apartments, who were qualified to be tenants therein when they

first experienced race discrimination there, will now be allowed to prove and recover whatever damages they have experienced or will experience from the disciminatory intent and actions of the defendants herein. All other black applicants for apartments at Dellway Villa Apartments, 2533 Dickerson Road, Nashville, Tennessee, are hereby found by this Court not to have suffered any damages from their treatment at the Dellway Villa Apartments; therefore they will not be allowed to proceed to the next stage of this case.

III.

Rule 54(b) requires that certain findings be made in justifying the entry of final judgment as to some of the claims or parties in a multiple claim, multiple party action. The first such requisite finding is whether the action is a multiple party, multiple claim action. The case *sub judice* obviously involves multiple parties; the unsuccessful claims of class members excluded from recovery also constitute multiple claims under Rule 54(b).

The next determination required to be made is whether the decision involved is a "final judgment." The Supreme Court spelled out the test for this determination in *Curtiss-Wright Corp. v. General Electric Corp.*, —U.S.—,100 S.Ct. 1460,—L.Ed.2d—(1980):

> It must be a "judgment" in the sense that it is a decision upon a cognizable claim for relief, and it must be "final" in the sense that it is "an ultimate disposition of an individual claim entered in the course of a multiple claim action." (Citation omitted)

The decision set forth in this Court's Memorandum and order of September 3, 1980, is a decision upon the claims for relief of those black Dellway Villa applicants for whom it makes the finding that they suffered no damages. That each black Dellway Villa applicant has a cognizable claim for relief is shown by the facts of this case and the Supreme Court's holding in

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 S. Ct. 1601, 60 L. Ed.2d 66 (1979), that all victims of Title VIII violations have a judicial remedy in federal court under 42 U.S.C. § 3612. That private judicial remedy clearly includes the right to recover damages.

This Court's decision of September 3, 1980, constitutes the ultimate disposition of the individual claims for damages of all those black Dellway Villa applicants whom the decision indicates suffered no damages. This decision is the last possible step for those claims for monetary relief of those excluded class members. There is nothing more that the class members excluded from monetary recovery by this Court's September 3, 1980, order can do in this Court at this time to gain monetary relief. Therefore, this Court's September 3 decision is a final decision on the claims for monetary relief of all those black Dellway Villa applicants for whom it determines that they suffered no damages and can have no recovery.

IV.

Having found that the exclusion of these black Dellway Villa applicants from recovery herein is a final judgment on their claims for monetary relief, this Court now finds that there is no just reason for delay in the entry of this final judgment. This Court finds that now is the appropriate time for such entry of final judgment because this final decision is ready for appeal.

Once again, *Curtiss-Wright, supra,* provides the analytical framework on which this decision has been made (100 S. Ct. 1464):

> Once having found finality, the district court must go on to determine whether there is any just reason for delay.
>
> *************
>
> Thus, in deciding whether there are no just reasons to

> delay the appeal of individual final judgments in setting such as this, a district court must take into account judicial administrative interests as well as the equities involved. Considerationm of the former is necessary to assure that application of the rule effectively "preserves the appeals." (Citation omitted.) It was therefore proper for the District Judge here to consider such factors as whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals.

The entry of the final judgment under consideration here will not slight either of the judicial administrative interests specified in *Curtiss-Wright*. the claims of the black Dellway Villa applicants excluded from recovery by this judgment are unquestionably separable from the claims which remain here in the District Court. According to 9 Moore, *Federal Practice*, ¶203.11, the entry and appeal of the final judgment against these black Dellway Villa applicants will have no effect on the ability of the class members remaining herein to proceed to judgment and recovery against these defendants:

> Nor should an appeal from an order which is appealable by virture of certification under Rule 54(b) prevent the District Court from proceeding with the remaining claims.

As to whether an appellate court will have to decide the same issues more than once if there are subsequent appeals, the peculiar facts of this indicate that multiple appellate review of the same issues will not be necessary. This Court has concluded that the applicants excluded from recovery by this judgment suffered no damages because they were not denied housing. If an appellate court determines that the applicants excluded from recovery by this Court's Memorandum and Order of September 3, 1980, are entitled to prove and recover their damages from race discrimination in housing at Dellway Villa, that determina-

tion will require a finding that those applicants were denied housing because of their race due to the discriminatory tenant selection practices and procedures at Dellway Villa. That finding of race discrimination in the selection of tenants at Dellway will necessarily be a class-wide finding as to all black Dellway applicants and thus *res judicata* as to the issue of whether the applicants now allowed to proceed to recover were also discriminated against. Therefore certification of this judgment under Rule 54(b) will not result in multiple appellate review of the same issues; rather, it will hasten appellate review of this Court's finding of the racial selectiveness of the defendants' tenant selection policies, practices and procedures at Dellway Villa.

IV.

Underlying the judicial administrative interests analysis and the analysis of the equities involved is the congressional mandate set forth in 42 U.S.C. § 3614 that any court in which the Title VIII action is filed to "cause the case to be in every way expedited." This mandate reflects the congressional view that the remediation of housing discrimination is "a policy that Congress considered to be of the highest priority." *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 935 S.W. 364, 34 L.Ed.2d 415 (1972). Because of this mandate, a "just reason for delay" cannot be articulated herein.

The district court's exercise of discretion as to whether to certify a judgment under Rule 54(b) must be quided by "juridically sound", factually supported weighing of the equities and analysis of the facts. *Curtiss-Wright, supra.* The presence of the statutory mandate for expediting the case makes the equities heavily favor the granting of certification, particularly when coupled with the need for each housing discrimination victim to have his or her day in court before the events that transpired at Dellway Villa and in each applicant household recede even further into the past. No inequities to any party will result from the granting of 54(b) certification herein. Indeed, all parties will

benefit from the more prompt resolution of the claims at issue here.

CONCLUSION

The particular facts of this case indicate that no judicial administratilve interests will be harmed by the granting of Rule 54(b) certification in the entry of this final judgment. The equities of the case very heavily favor the granting of Rule 54(b) certification, particularly when view in light of the statutory command of 42 U.S.C. § 3614 for this Court to expedite this case by the discretionary act of dispatching these claims for appeal. Therefore, the Plantiffs' Petition for Rule 54(b) Certification of the exclusion from recovery of all those black Dellway Villa applicants not within the recovering group specified by this Court's Memorandum of September 3, 1980, is hereby granted. The entry of the judgment of no damages and no recovery for those excluded black Dellway Villa applicants is hereby expressly directed; this Court expressly finds that there is no just reason for delay in the entry of this final judgment. An appropriate order will be entered.

/s/ L. Clure Morton

CHIEF JUDGE

APPENDIX C

No. 79-3100-NACV

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

Charlie Mai Jordan, and Vanessa R. Bush, Individually and on behalf of all other persons similarly situated,
Plaintiffs,

v.

Dellway Villa of Tenn., Ltd., et al.,
Defendents.

(Filed October 23, 1980.)

MOTION TO SET DAMAGES AWARDS GUIDELINES

Come now the plantiffs, by and through their attorneys, and move this honorable Court to determine the guidelines for damages awards herein. Plantiffs propose, as supported by the accompanying brief, that each class member be compensated for the following herein, where they are proven to exist:

1. Rent in excess of that which the class member would have paid at Dellway Villa for the period of time from the first time that the respective class member was discriminated against until the discrimination was cured;

2. Utility payments in excess of those which the claimant would have paid at Dellway Villa for the period of time set forth in paragraph number one above.

3. The difference between the market value of the Dellway Villa Apartment as to which the claimant experienced

discrimination and the market value of the housing actually obtained by the claimant for that period of time set forth in paragraph number one above.

4. Any out-of-pocket expenses experienced by the claimant in his attempts to secure housing at Dellway Villa and the other housing to which he was forced to resort because of the discrimination at Dellway Villa.

5. Any outrage, embarrassment, humiliation, or mental or emotional distress experienced by the claimant as a result of discriminatory or otherwise hostile actions of the defendants toward the claimant.

6. Any mental or emotional distress experienced by the claimant resulting from the loss of housing at Dellway Villa, including any distress or embarrasment at being forced to live in substandard or overcrowded housing and any mental or emotional distress experienced as a result of the claimant's inability to secure admission to Dellway Villa.

7. Any mental or emotional distress experienced by the claimant's immediate family as a result of the claimant's inability to gain admission to Dellway Villa.

8. Any additional damages proved by the claimant to have been caused by the discriminatory intent and actions of the defendants herein.

Respectfully submitted,

/s/ William H. West

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APPENDIX D

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be suied as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is

superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims n the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date: (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those

to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some of all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to elminate therefrom allegations as to representation of absent person, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. (As amended Feb. 28, 1966, eff. July 1, 1966.)

Opposition

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NO. 81-1349

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DELLWAY VILLA OF TENNESSEE, LTD., et al.,
Petitioners,

v.

CHARLIE MAI JORDAN,
et al.,
Respondents

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Sixth Circuit correctly held that the District Court herein erred by excluding persons who were denied housing because of their race from proving and recovering damages resulting from that illegal discrimination against them.

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NO. 81-1349

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DELLWAY VILLA OF TENNESSEE, LTD., et al.,
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v.

CHARLIE MAI JORDAN,
et al.,
Respondents

Brief in Opposition to Petition for
Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit sought to be reviewed herein, rendered on October 19, 1981, is reported at 661 F.2d 588 (6th Cir. 1981).

The unreported Memorandum and Order in which the Honorable L. Clure Morton, Chief District Judge, originally found these defendants to have violated 42 U.S.C. §§1982 and 3604 is attached hereto as Appendix A.

COUNTERSTATEMENT OF THE CASE

Plaintiffs filed this class action lawsuit on February 28, 1979, pursuant to 42 U.S.C. §1982 and §3604, alleging that the defendants discriminated against black applicants by way of certain tenant selection policies and procedures at Dellway Villa Apartments in Nashville, Tennessee. Dellway Villa is a federally subsidized housing project intended to house families eligible for housing assistance payments pursuant to the provisions of Section 8 of the U.S. Housing Act of 1937, 42 U.S.C. §1437(f). Maintenance of the suit as a class action is based

upon Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. At the inception of this action 100 of the 244 units at Dellway Villa Apartments were rented, with the remaining units under construction. The Court of Appeals found that 161 apartments at Dellway Villa were rented by the time this action was tried in June, 1979.

The plaintiffs filed their motions for class certification and preliminary injunction on April 12, 1979. Plaintiffs' motions for class certification and preliminary injunction were heard on June 5, 1979. The first stage of this bifurcated proceeding, which was limited to the issue of liability only, began on June 14, 1979. The case was tried in four days before Chief District Judge L. Clure Morton. On September 10, 1979, the court entered its memorandum opinion on the liability issue, finding all defendants guilty of discrimination in violation of 42 U.S.C. §1982 and §3604. On that same date, the Court entered an order originally rendered from the bench on June 5, 1979, certifying a class consisting of "all black persons who have been, or will be, denied housing at the Dellway Villa Apartments, 2533 Dickerson Road, Nashville, Tennessee because of their race."

As the Court of Appeals found, at 661 F.2d 591, Judge Morton indicated to the parties that he "intended to limit the number of class members that (he) would allow to prove and recover damages. Thus, plaintiffs filed a motion on January 29, 1980, to clarify the class members' eligibility for damages." On February 22, 1980, the court issued an order which would allow only those qualified black applicants who were rejected to recover monetary damages. Plaintiffs subsequently moved for a reconsideration of that order.

The District Court then entered an order on March 10, 1980, which stated "any applicant who was discriminated against by defendant and who was qualified at the time of discrimination

but limited to the total number of apartments available may recover." Plaintiffs' attempts to appeal this order were denied.

Plaintiffs moved on July 30, 1980, for the District Court to reconsider and reverse its limitation on class recover on the grounds that:

> Such a numerical limit on the number of recovering class members contravenes the directive of the Rules Enabling Act, 28 U.S.C. §2072, against the abridgment of substantive rights by the application of the Rules of Civil Procedure. Such abridgement herein is shown by the fact that the qualified class members precluded from recovery by the March 10 order could have unquestionably recovered under the proof herein if they had sued individually.

This motion for reconsideration was denied on September 3, 1980, at which time the District Court entered a memorandum opinion in which it found that those class members excluded from recovery by the numerical limit could not have suffered any damages. On October 3, 1980, plaintiffs petitioned for entry of final judgment pursuant to Rule 54(b) of the District Court's finding of no damages and no recovery for those class members excluded from recovery by the numerical limit even though the class members had not yet had the opportunity to testify or otherwise present proof concerning their damages. The petition was granted on October 8, 1980, and an appropriate memorandum and order of final judgment was entered on October 23, 1980. The plaintiffs appealed the district court's October 23, 1980, order, which found no damages and no recovery for those black Dellway Villa applicants who were not among the first 48 qualified applicants for a one-bedroom apartment, the first 108 qualified applicants for a two-bedroom apartment, and the first 88 qualified applicants for a three-bedroom apartment, to the United States Court of Appeals for the Sixth Circuit. On October 19, 1981, the court of appeals, with one judge dissenting, reversed the judgment of the district court and remanded the cause for further proceedings.

REASONS FOR DENYING THE PETITION

1. The United States Court Of Appeals For The Sixth Circuit Correctly Concluded That The District Court Erred By Failing To Apply The Analysis And Procedures Directed By This Court In International Brotherhood Of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 56 L.Ed.2d 329 (1977), To Be Employed In Determining Whether Individual Black Applicants Were Discriminated Against By Practices And Procedures That Have Been Found To Be A Pattern And Practice Of Intentional Race Discrimination.

The Sixth Circuit's decision in the case of Jordan and Bush, et al. v. Dellway Villa of Tennessee, Ltd., et al. is found at 661 F.2d 588 (6th Cir. 1981). In that opinion, Judge Keith and Chief Judge Edwards held that (661 F.2d 592):

> We believe that the propriety of the District Court's final order limiting class recovery rests upon whether those eligible to recover damages, under the order, include all of the members of plaintiffs' class who were actually denied housing because of their race. After an examination of the record, we must conclude that the District Court's final order improperly excludes persons who may have been denied housing at Dellway Villa because of unlawful discrimination.

Despite this Court's mandate in International Brotherhood of Teamsters v. United States, 426 U.S. 340, 97 S.Ct. 1843, 56 L.Ed.2d 329 (1977), the Court of Appeals found that the District Court failed to employ the Teamsters analysis because of its erroneous legal conclusions:

> The appellees maintain, and the District Court concluded, that a number of the unsuccessful black applicants were not actually discriminated against and are not entitled to individual relief under Teamsters. In support of this conclusion, the District Court reasoned that although there were vacancies at the time these class members filed their applications, no vacancies would have existed at that time if the appellees had processed in a non-discriminatory manner all the applications they received. In other words, since there are only 244 apartment units at Dellway Villa, only 244 members of plaintiff's class can recover damages. This is because if the appellees had not discriminated against this group of 244, there would have been no vacancies for the others.

> We cannot accept this analysis. We find no support in the law for the notion that a defendant can discriminate against and be required to pay damages to only the number of applicants equal to the number of openings available.

The defendants have not supplied this Court with any authority or reasoning to support the District Court's conclusion of law that the number of black housing applicants that housing discrimination practitioners can discriminate against and cause damage to is limited strictly to the number of apartments available. The defendants were unable to supply the Court of Appeals with any such authority or reasoning. Plaintiffs submit that the Court of Appeals was indisputably correct: There is no support in the law for the notion that the number of available apartments limits the number of potential victims of race discrimination in housing.

Plaintiffs submit that the analysis of the District Court resembles the equitable remedial analysis that would apply if this were a Title VII case instead of a Title VIII case. This Court emphasized in Curtis v. Loether, 418 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974) that Title VIII relief differs sharply from that available under Title VII. As Justice Stevens wrote for the Seventh Circuit in the affirmed appellate version of Curtis (Rogers v. Loether, 467 F.2d 1110, 1122 (7th Cir. 1972)):

> The payment of compensatory damages in a housing discrimination case, however, is not a return to plaintiff of something which defendant illegally obtained or retained; it is a payment in money for those losses - tangible and intangible - which plaintiff has suffered by reason of a breach of duty by defendant. Such damages, as opposed to rent overcharges, unpaid overtime wages, or back pay, cannot properly be termed restitution.

Other Courts of Appeals have made similar rules on the scope and nature of relief under the housing discrimination statutes. In U.S. v. Long, 537 F.2d 1151, 1153-1154 (4th Cir. 1975), the Fourth Circuit held:

> Damages...are determined by reference to the loss sustained by a victim as the result of wrongful conduct of another.
>
> * * * *
>
> In the present case, of course, the effect of the defendants' discriminatory conduct has been to deny blacks an equal opportunity to obtain housing. The damages suffered by the victims of such conduct may be the expense of obtaining nondiscriminatory housing, or of an intangible nature such as the embarrassment attendant upon being relegated to sub-standard housing. The possibilities are numerous, of course, but they have one thing in common - they are damages properly recoverable in a court of law.

In U.S. v. Mitchell, 580 F.2d 789, 793 (5th Cir. 1978), the Fifth Circuit held that, in Curtis, supra, the Supreme Court had:

> refused to analogize the Fair Housing Act remedy to Title VII's restitutionary back pay remedy, holding explicitly that the §3612 remedy had a compensatory rather than restitutionary purpose.

In Rogers v. Loether, supra, at 1121, the Seventh Circuit indicated the inappropriateness of a status quo-oriented remedial approach in damages actions:

> It is not unreasonable to regard an award of back pay as an appropriate exercise of a chancellor's power to require restitution. Restitution is clearly an equitable remedy. As Professor Moore put it:
>
> 'In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge illgotten gains or to restore the status quo, or to accomplish both objectives.'
>
> The retention of "wages" which would have been paid but for the statutory violation (of improper discharge) might well be considered "ill-gotten gains"; ultimate payment restores the situation to that which would have existed had the statute not been violated. (Footnotes omitted).

The numerical limit on recovering class members imposed by the District Court is clearly an attempt to base the remedies allowed herein to victims of race discrimination in housing on the status quo that would have existed absent the discrimination. As Rogers v. Loether, supra, and Curtis v. Loether, supra, show, this remedial analysis is basically an equitable one that does not apply in the damages-oriented remedial scheme of housing discrimination law.

As the Court of Appeals found herein (661 F.2d 594), the District Court failed to apply this Court's analysis in Teamsters, supra, because of this erroneous conclusion of law as to the relief available. The district court found, and based the order appealed from on the notion that, the status quo that would have existed absent the discrimination was the sole determinant of the class members who would be allowed to prove and recover any damages from these defendants for the intentional, systematic race discrimination in housing at Dellway Villa. The Court of Appeals corrected this erroneous conclusion and directed that the precedents of this Court be employed in determining the damages experienced by the class members herein.

As the cases cited above indicate, the District Court herein was in error. The decision of the Court of Appeals corrected that error. Therefore, there is no necessity for granting this petition for certiorari. It should be denied.

2. The Court Of Appeals Correctly Held That The District Court Has No Discretion To Exclude Victims Of Intentional Race Discrimination In Housing From Recovery Of Damages Without Hearing Proof On Their Damages Claims.

This Court's holding in Curtis v. Loether, supra, that a district court has no discretion to refuse to award actual damages to a victim of proven unlawful discrimination necessitates the conclusion that victims of proven unlawful discrimination must be given the opportunity to prove their damages. Despite this, the district court herein made express findings of no damages and no recovery for hundreds of victims of race discrimination in housing at Dellway Villa without having heard any proof from them as to their experiences in attempting to obtain housing there. This ruling was made prior to the occurrence of any damages hearings in this bifurcated trial. Therefore, the district court failed to carry out the remedial mandate of Curtis, supra.

The order which was originally appealed herein, the District Court's order and Memorandum of final Judgment of October 23, 1980, was entered in response to plaintiffs' request for reconsideration of limitation on class recovery. This reconsideration request was filed in response to the District Court's decision on March 10, 1980 to impose a purely numerical limit on the number of applicants recovering damages from the discrimination at Dellway Villa to "the total number of apartments available." The District Court's order of October 23, 1980, incorporated the Memorandum of Final Judgment filed on the same date. As the title indicates, and as the terms of the October 23, 1980 order themselves show, there is no question that the district judge, Judge Morton, was reaching a final decision on the substantive merits of the claims of most of the class members herein. At this point in the proceedings, Judge Morton had not yet heard any testimony on the issue of damages. The damages hearings herein did not begin until after this Order and memorandum were filed.

In his memorandum of October 23, 1980, Judge Morton held:

> This Court's decision of September 3, 1980, constitutes the ultimate disposition of the individual claims for damages of all those black Dellway Villa applicants who the decision indicates suffered no damages. This decision is the last possible step for those claims for monetary relief of those excluded class members. (Petition, B-5)
>
> * * * * *
>
> This Court has concluded that the applicants excluded from recovery by this judgment suffered no damages because they were not denied housing. (Petition, B-6)
>
> * * * * *
>
> The decision set forth in this Court's Memorandum and Order of September 3, 1980, is a decision upon the claims for relief of those black Dellway Villa applicants for whom it makes the finding that they suffered no damages. (Petition, B-4)
>
> * * * * *
>
> Having found that the exclusion of these black Dellway Villa applicants from recovery herein is a final judgment on their claims for monetary

> relief, this Court now finds that there is no just reason for delay in the entry of this final judgment. (Petition, B-5)

In addition, the terms of the October 23, 1980 Order clearly indicate that it is a substantive judgment. The District Court found that all those black applicants who were not among the first 244 respective qualified applicants for housing at Dellway Villa had "no damages" and therefore could receive "no recovery" in this action.

Curtis, supra, clearly requires the conclusion that if Judge Morton herein reached his conclusion excluding most class members from recovery for any procedural reason, then he abused his discretion, since he had none to deny damages to victims who have proven discrimination. The Curtis principle reflects the basic remedial logic of our legal system. In cases as early as Marbury v. Madison, 5 U.S. 136 (1803), this Court held that:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, when he receives an injury. One of the first duties of government is to afford that protection.

That remedial wisdom has been repeated in more recent affirmations such as that quoted by Justice Rehnquist in his concurrence to Albemarle Paper Co. v. Moody, 422 U.S. 405, 441; 95 S.Ct. 2362, 2385, 45 L.Ed.2d 280 (1975):

> The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. The difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of plaintiff's rights. Story Parchment Co. v. Patterson, 282 U.S. 555, 565, 51 S.Ct. 244, 75 L.Ed. 544, cited in Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265, 66 S.Ct. 574, 580, 90 L.Ed. 652 (1946). But precisely to the extent that an award of backpay is thought to flow as a matter of course from a finding of wrongdoing, and thereby becomes virtually indistinguishable from an award for damages,. . .

Writing for this Court in Furnco Construction Co. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978), Justice Renquist reiterated this Court's continuing concern for the protection of every individual's right not to be discriminated against:

> It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether other members of the applicant's race are proportionately represented in the work force. (emphasis in original).

The petitioners offer no reasoned support for their conclusions that the District Court should be allowed to judge the substantive right of the claimant class members without hearing any evidence on their claims for damages. As the Court of Appeals indicated, there is no authority to support that position or the underlying reasoning of the District Court to the effect that if a hypothetical fair processing had occurred, these individuals would not have received apartments.

The only reasoning cited by petitioners for their position that the District Court has the power and discretion to render negative judgments on substantive claims for recovery without hearing proof from the individuals whose claims are judged is their confused perception of the holdings by the Sixth Circuit in Weathers v. Peters Realty Corp., 499 F.2d 1197 (6th Cir. 1974). In that decision, Judge Miller, writing for the Sixth Circuit, stated for the Court:

> When monetary damages are sought, the reasons that District Courts may see fit to confine the class more narrowly are, first, to protect the defendant in preparing his defenses against various damages claims, and second, to make the disposition of the class more manageable since the evidence as to individual claims may vary widely in scope and character.

The petitioners mistakenly assume that Judge Miller meant that the Court had the power to cut off substantive recovery rights of class members in order to protect defendants when assessing the maintainability of the class action. In the text of the Weathers decision itself, however, at 499 F.2d 1201, Judge Miller states precisely the opposite, holding that the District Court must totally refrain from assessing the merits of the substantive

claims when performing the maintainability inquiries referred to in the quoted paragraph above:

> Additionally, when determining the maintainability of a class action, the District Court must confine itself to the requirements of Rule 23 and not assess the likelihood of success on the merits. (Emphasis added.)

In this ruling, Judge Miller cites and applies the Supreme Court's decision in Eisen v. Carlisle and Jacquelin, et al., 417 U. S. 156, 177, 94 S.Ct. 2140, 2152, 40 L.Ed.2d 732 (1974). As Judge Weick indicates in his dissent in the instant decision in the Sixth Circuit (661 F.2d 597), any limitation on class size properly imposed under the Weathers decision would be procedural only; it would not cut off the recovery rights of those excluded from the action. The claimants excluded from the class action would still have an independent right of recovery which they could assert individually. As the Court of Appeals majority correctly held in the instant case, however, and as the defendants admitted in the Court of Appeals, Judge Morton's decision on appeal herein is a substantive one. It is not a procedural decision to limit the class. Because he cuts off the substantive recovery rights of so many individuals, it has the incidental effect of limiting the class. However, it is not a decision on the maintainability or the scope of a class itself.

If the decision on appeal herein were deemed to be a procedural decision on maintainability, and yet still had the effect of terminating the substantive recovery rights of individual black applicant victims of race discrimination in housing at Dellway Villa, the decision would be an abuse of discretion that would require reversal. It would then be contrary to the Rules Enabling Act, 28 U.S.C. §2072, which forbids the abridgment of any substantive rights by the Federal Rules of Civil Procedure. Any procedural rulings made thereunder must be guided by the prescriptive force

of the Rules Enabling Act. The Fifth Circuit, for instance, held in Perry v. Allen, 239 F.2d 107, 111-112 (5th Cir. 1956), that:

> It is plain that these rules are designed to provide the machinery for the administration of justice, the modes of proceeding by which legal rights are enforced, and do not purport to deal with the law which gives or defines such rights, or their character, or the existence or boundaries of the remedies vouchsafed for the establishment of those rights; and that the procedures they provide are only means to the end of achieving substantial justice and are not ends in themselves. (Emphasis added.)

The Fifth Circuit reaffirmed this view of the Rules Enabling Act in Alabama v. Bluebird Body Co., Inc., 573 F.2d 309 (5th Cir. 1978):

> It is axiomatic that a procedural rule cannot "abridge enlarge, or modify any substantive right." Consequently, this Court has no power to define differently the substantive rights of individual plaintiffs as compared to class plaintiffs.

Similar rulings applying the Rules Enabling Act prescriptively were made by the Ninth Circuit in In Re Hotel Telephone Overcharges, 500 F.2d 86 (9th Cir. 1974), the Fourth Circuit in Windham v. American Brands, 565 F.2d 59 (4th Cir. 1977), cert. den., 435 U.S. 968, 98 S.Ct. 1605, 56 L.Ed.2d 58 (1978, and the Seventh Circuit in In Re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979).

In the General Motors decision, supra, the Seventh Circuit also held (note 33, at 595 F.2d 1128):

> The class action, although it also provides a vehicle for furthering the substantive policies behind legislation, is primarily a device to vindicate the rights of individual class members.

When the respondents herein raised these arguments based on the Rules Enabling Act in response to Judge Morton's Order of March 10, 1980, imposing a numerical limit on the class members who could recover damages, Judge Morton's response was to make his findings that the individuals excluded by his numerical limit order had not suffered any damages and had not been denied housing. Clearly, Judge Morton's decision is not a procedural decision.

The defendants admit on page 7 of their petition that the district court's decision at issue here is a substantive one. The error in their attempted alchemy of that substantive decision into one that is merely procedural is patent in their statement that "reasons which might be classified as substantive are not mutually exclusive from those which might be characterized as procedural." The error in this statement is also apparent in the way that their only cited authority (Weathers, supra) contradicts their assertion that a district judge must inquire into the substantive merits of individual claims "for purposes of determining manageability." As pointed out supra, Judge Miller correctly applied this Court's holding in Eisen, supra, that the district court must not inquire into the substantive merits of class members' claims when determining the maintainability of the class action. There is no "gray area" between substance and procedure in this case. The Sixth Circuit correctly held that Weathers, supra, cannot apply in this case because of the substantive nature of the district court's decision. The Sixth Circuit's reversal of Judge Morton's erroneous conclusions of law is correct. Therefore, this petition for certiorari should be denied.

3. The Defendants' Concern Over Manageability Can Best Be Assuaged By Denial Of Their Petition For Certiorari.

The defendants herein have never moved for decertification of this class action despite the concerns they manifest over this issue in their petition for certiorari. If their petition is denied by this Court, the defendants will be free to bring this issue to the attention of the district court. The district court can then make any factual inquiries it deems appropriate.

According to Rule 23, manageability is an express concern only for a Rule 23(b)(3) class action. The class action herein is classified as a Rule 23(b)(2) class action, in keeping with

the normal procedural analysis of civil rights class actions. As the original liability findings herein (see Appendix) indicate, the defendants herein discriminated against class members by refusing to take action on their applications while simultaneously processing and admitting whites promptly. This illegal activity is clearly within the express terms of Rule 23(b)(2). The defendants do not contest the classification of this action as a Rule 23(b)(2) class action in their petition to this Court. The defendants did not contest the (b)(2) classification in the district court or the Court of Appeals.

Even if manageability, despite its absence as an express requirement of Rule 23(b)(2), were deemed to be an issue herein by this Court, denial of this petition for certiorari would still be mandated by these facts. The defendants will then have the opportunity to bring these issues to the attention of the district court.

The district court is the proper forum for the resolution of management problems in class actions. Arthur Young & Co. v. United States District Court, 549 F.2d 686 (9th Cir. 1977).[1/] The district court must be presented with "hard data" "as to the actual difficulty" of managing the class action before denying certification on grounds of manageability. Neely v. United States, 546 F.2d 1059 (3rd Cir. 1976). The district court herein has not yet faced the issue of the manageability of this action as a class action in the light of the Sixth Circuit's decision herein; no "hard data" has been presented to it to justify decertification.

It should be noted that decertification of this class action will lead to a loss of judicial economy. Assuming the defendants' worst-case scenario actualizes, the district court in Nashville will then have 1150 individual actions being pursued on these facts. The problems stated by defendants in their petition (judicial economy, practical limitations of the district court, and their burden

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[1/] Cert. den., 434 U.S. 829, 98 S.Ct. 109, 54 L.Ed.2d 88 (1977).

of discovery) would be increased if this action were decertified as a class action because of "unmanageability." The legal problems generated by these facts are far more manageable as a class action than otherwise. In any case, the district court should be the court where these factual issues are weighed. If this petition is denied, that is precisely what will happen.

4. The Denial Of Certiorari Herein Will Lead To The Wholly Just Result Of Full Enforcement Of Title VIII And 42 U.S.C. §1982.

The findings of the District Court in its original memorandum opinion of 1979 (Appendix at 3-7) clearly show that intentional race discrimination in housing was occurring on a massive scale at Dellway Villa.

In addition to the District Court's findings cited by the Court of Appeals at 661 F.2d 589-590, there are many other signs in the record of the intentional discrimination practiced at Dellway Villa. For instance, the patterns of prompt admission of later-applying whites (Appendix at 4, 5) while excluding earlier-applying blacks, closely resemble the discriminatory practices found to be illegal in U. S. v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971). The similarity of the "fruitless phone calls" and repeated visits required of black applicants and the frequent admission of whites "with little or no delay" in West Peachtree to the findings herein cited above, clearly indicates that race discrimination in housing was as extant in Nashville in 1978 and 1979 as it had been in Atlanta in 1968.

The denial of this certiorari petition will directly result in the full enforcement of Title VIII and §1982. Every victim of the discrimination proven to have occurred at Dellway Villa will have her day in court if this petition is denied. Full Supreme Court review of this case is not necessary to attain this just result. This petition should be denied so that this Court's holdings

in Teamsters, supra, Curtis, supra, and Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), can be applied to these facts, as the Sixth Circuit directed in its opinion of October 19, 1981.

CONCLUSION

For the reasons set forth above, this petition for certiorari should be denied.

Respectfully submitted,

William H. West

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APPENDIX

UNITED STATES DISTRICT COURT FOR THE

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

CHARLIE MAI JORDAN and VANESSA R. BUSH, individually and on behalf of all other persons similarly situated	)	
vs.	)	NO. 79-3100-NA-CV
DELLWAY VILLA OF TENNESSEE, LTD., et al.	)	

MEMORANDUM

Plaintiffs bring this class action alleging discriminatory practices in the selection of tenants in an apartment project constructed pursuant to Section 8 of the U. S. Housing Act of 1937, as amended. They assert the suit is brought pursuant to 42 U.S.C. §§1981, 1982, 2000(d), 3604 and 28 U.S.C. §§2001, et seq. Jurisdiction is asserted pursuant to 28 U.S.C. §1343 and 42 U.S.C. §3612.

On September 30, 1977, Dellway Villa, a limited partnership, entered into a contract with the United States of America, acting through the Secretary of Housing and Urban Development, to erect an apartment complex pursuant to the provisions of Section 8 of the U. S. Housing Act of 1937. The underlying principle of this type of agreement is that the government will make housing assistance payments on behalf of eligible families leasing newly-constructed housing.

L. H. Hardaway, Sr., and L. H. Hardaway, Jr., are the funding partners of Dellway Villa of Tennessee, Ltd. Imperial Management Company is a management company composed of L. H. Hardaway, Sr., and L. H. Hardaway, Jr., as its sole partners. Rodman Lilly was the general manager of Imperial Management Company from February 1977 to April 14, 1979. In such capacity, he supervised the site managers of the various apartment complexes under the contract with Imperial Management Company. Laura Notgrass was site manager

of Dellway Villa Apartments from August, 1978 to February 17, 1979. From June 1978 until August 1978 she was in charge of the tenant applications for Dellway Villa.

Information that a low-cost housing development was being built which included carpeting in the apartments and a swimming pool for the tenants became general knowledge durings its construction. Although no apartments were completed until September 1978, applications for tenant occupancy were accepted by defendants Hardaway, Imperial, Lilly and Notgrass as early as June 27, 1977. The applications specified needs of one, two and three bedroom units. From June 1977 until June 1978 hundreds of applications were accepted and placed in a filing cabinet. They were not separatcd as to size or date, nor were they alphabetized. In August 1978 Notgrass, as site manager, moved into an office at Dellway Villa and continued to accept applications. Although the entire complex was to contain only 244 units, at least 1,620 applications were accepted.

Beginning in August 1978, the applications which specified race were separated into three categories, according to number of bedrooms requested, and each group was alphabetized. However, there was no effort to establish an order of preference based on date of application or date of receipt.

Beginning in September 1978, the site manager began to designate successful applicants for occupancy. She complained that she needed assistance but defendants Hardaway refused to provide additional personnel because the project as yet had no income. The site manager was not furnished any criteria for tenant selection, except to select the best available from those who qualified. The site manager was less than objective. She subjectively determined who she thought would be good tenants, i.e., cause little trouble, not destroy property, exhibit a stable family, etc. In so doing, she made no attempt to evaluate the applications in order of date or receipt. In effect, she had no system to prevent

preference of one person over another or white over black. Although she professed no racial bias in her selections, the court finds to the contrary. Her attitude can be best illustrated by her testimony in referring to a successful applicant that "she begged for it humbly." On one application, she noted: "Black but nice: old, but nice looking, grey eyes and light skin." She was discourteous to black applicants. She treated white applicants with respect. She planned to limit the number of black occupants in each unit. She could find available apartments for white applicants but not for blacks.

General Manager Lilly instructed Notgrass in her duties in tenant selections. The first step was to check applications for completeness. The second step was to select the best tenant from all applications. The third step was to eliminate all single persons. The fourth step was to ascertain the number of persons in each family. The fifth step was to "get the feel of the applicant." Lilly knew that the site manager needed assistance, but it was refused. He was in constant contact with HUD personnel. He was aware that impartial criteria for tenant selection in the form of a written plan was required. Such a plan was developed and submitted to HUD between November 7 and November 15, 1978. However it was not implemented until Notgrass left on February 17, 1979. Notgrass refused to accept such a plan, but insisted on continuing her method of tenant selection because it gave her more control. Lilly received complaints that Notgrass was racially biased and was being rude to black applicants. Although admonishing her about rudeness, he permitted her to continue her subjective tenant selection.

Notgrass ceased being site manager on February 15, 1979, and a black female, Appleton, was hired as site manager. Thereafter written criteria approved by HUD were used in tenant selection with startling results.

By November 1978 it was obvious that defendants faced difficult problems because of the clamor of the applicants and the belated interest of HUD. Although by February 14, 1979, when applications were no longer accepted, there were 1,622 applications, most of them had also been on file in November 1978. Thereafter, as a calculated course of conduct, defendants began notifying certain tenants that they were not qualified because their applications were incomplete. Of course, "only by chance," this elementary process operated to eliminate 424 black applicants. A persual of the applications of the successful white applicants reveals that the above action was an ill-calculated subterfuge in that their applications were in the main incomplete.

White admissions to Dellway Villa often occurred within a week or two of applying for housing, while very few blacks gained admittance, even with long delays. Application forms and lease pages for white tenants, for example, show the following periods of application pendencies:

White Tenant	Apartment	Application Date	Lease Date
Donna Birdwell	101-A	9-6-78	9-15-78
Fritz Schubert	107-A	9-1-78	9-15-78
Bud Morgan	111-A	9-13-78	9-18-78
Sara Nollner	113-A	9-20-78	9-25-78
Thelma Edwards	116-A	2-2-79	2-13-79
Birdie Robinson	132-B	10-20-78	11-11-78
James Midgett	130-B	10-30-78	11-3-78
Herman Weaver	131-B	10-23-78	11-3-78
Billy Bowman	315-N	9-18-78	9-21-78
Logan Johnson	318-N	8-23-78	9-15-78
James Graham	319-N	9-11-78	9-15-78
Kimberly Russell	327-N	8-17-78	9-15-78
Betty Gregory	298-M	10-15-78	10-19-78
Brenda Alcorn	299-M	9-31-78	10-25-78
Annette Wheeler	309-M	9-14-78	10-25-78
Johnny Byrd	312-M	9-11-78	10-25-78

Defendant Notgrass put off black applicants' questions concerning their applications with indefinite statements that there would be openings in the future. Not only did she tell this to Ms. Bush and Ms. Snell, but this pattern is also apparent in notations on black applications in Exhibits 29 and 32. It can be most clearly

detected in admissions to the first two-bedroom building opened at Dellway Villa, Building D. As shown by Exhibit 43, Paulette Jones, a black woman, applied on August 14, 1978, for a two-bedroom apartment for herself and her son. On the right front of her application is the notation "9-29-78 told her it would be after February." Defendant Notgrass testified on cross examination that as a normal business practice, she recorded such conversations in notations on the back or side of the application, and frequently dated them. This is just such a notation. In collective Exhibit 24, concerning a two-bedroom applicant Glenn R. Pentecost who is white, the following notation is found in virtually the same place: "Promised a 2 br. She called 9-25-78 told her it would be Nov." Collective Exhibit 23 shows Glenn Pentecost signed a Dellway Villa lease on 1-12-79. Eight other whites applied after 9-29-78, when Paulette Jones was told by defendant Notgrass that she would have to wait until after February, and were admitted to Dellway Villa.

Tenant	Apartment	Application Date	Lease Date
Sarah Davis	149-D	12-12-78	1-12-79
Leo Foster	150-D	10-2-78	1-11-79
Dorothy Buchanon	153-D	11-13-78	1-13-79
Glenn Shockley	157-D	11-30-78	1-12-79
Virginia Kirby	158-D	11-14-78	1-12-79
Bobby Potts	161-D	12-5-78	1-13-79
Fred Thompson	162-D	11-6-78	1-12-79
Vicki Walkup	164-D	11-14-78	1-12-79

Other notations of delays similar to that communicated to Paulette Jones can be seen on the applications of Vanessa Bush, Eugene Scruggs, Ireace Parrish, Sandra McCullough, Shirlean Mitchell, and Joseph Cruther. Sandra McCullough applied on 11-15-78 for a two-bedroom apartment and was told as noted on her application, "9 mo. waiting," while white tenants Walkup and Kirby applied on 11-14-78 and leased two-bedroom apartments on 1-12-79; white tenant Buchanon applied 11-13-78 and leased 1-13-79; and white tenants Shockley and Potts applied after McCullough and leased 1-12-79 and 1-13-79.

This suit was filed on February 28, 1979. On that date 100 apartments were occupied. Eighteen were occupied by black persons and 82 by white persons. The existing applications numbered 1,622. Of this number, 1,195 were made by blacks and 427 by whites. Thus even though 70.9% of all applicants were black, only 18% were successful applicants. Since the filing of this suit, the hiring of a black site manager, and the implementation of the written selection process, additional approvals of blacks have occurred. Had these procedures been in effect from the beginning, the occupancy would have been 118 blacks, 121 whites, with 5 vacancies. This in and of itself presents a rather remarkable picture.

Throughout the entire time from the filing of these applications to the date of the filing of this suit, the individual plaintiffs who are qualified for housing pursuant to Section 8 have continued to seek occupancy in Dellway Villa. A great number of the other qualified applicants (members of the class) have likewise done so.

In connection with the actual knowledge of each defendant, it is pertinent to note that defendants knew of the huge demand for housing at Dellway Villa from the initial stages of operation of the complex. HUD witness Rucker's initial turndown of the Dellway proposal and the correspondence that followed told defendant Hardaway, Jr. of the black demand for Section 8 housing. Defendant Hardaway, Sr. testified at his deposition that he witnessed daily an influx of applicants for Dellway Villa at the Hardaway Company office prior to Dellway Villa's completion, and he realized that most of the applicants were black. Defendant Notgrass complained frequently to Lilly about the overwhelming volume of applications soon after she went out to the Dellway office in August 1979. At one point in the fall of 1978, defendant Notgrass stopped taking applications at HUD's suggestion

because of the huge volume of applications on hand. However, defendant Lilly instructed Notgrass to take applications again and "don't stop." Furthermore, defendants Lilly, Hardaway, Jr. and Hardaway, Sr. discussed hiring another staff to assist defendant Notgrass at Dellway Villa, but they decided, as Lilly stated, that "until the project started having some income coming in, we wanted to keep all expenses at a minimum." No additional help for Notgrass was hired until December, 1978, four months after Dellway Villa opened its offices on Dickerson Road.

The defendants Hardaway are not unaccustomed to the construction and administration of subsidized housing. They have participated in "236 programs", at least one other Section 8 program, and are managing some 1500 separate units of low-income housing. The contract documents dealing with construction and administration of Dellway Villa contain a covenant against racial discrimination. The contract documents adopted the national policy against racial discrimination. The defendants Hardaway were aware of, consented to, and were bound by the regulations dealing with the construction, operation, maintenance, and tenant selection applicable to Section 8, 24 C.F.R. 880.101, et seq., and 24 C.F.R. 881.218, as well as the rules affecting all subsidized public housing. Thus they are in no position to assert lack of understanding, innocence, or lack of willfulness. Furthermore, Hardaway, Jr., executed documents stating that he would be personally involved in the decision making and operation of Dellway Villa.

All of the hereinbefore recited matters are specifically found as fact by the court. In addition, the court finds as follows:

(1) defendants were not required to accept applications as early as June 1977;

(2) however, once accepted, defendants could not with impunity violate 42 U.S.C. §§1982 and 3604, et seq.,

(3) by preferring later qualified white applicants over prior qualified black applicants the defendants violated such statutes;

(4) each of the defendants had personal knowledge of the process being used in tenant selection at Dellway Village;

(5) Lilly and the two Hardaways deliberately vested Notgrass with the power to violate the aforesaid statutes; and

(6) the defendants Lilly and Hardaway cannot now proclaim their individual innocence of a process deliberately established.

CONCLUSIONS OF LAW

(1) This court has jurisdiction pursuant to 28 U.S.C. §1343 and 42 U.S.C. §3612.

(2) The defendants Notgrass, Lilly, L. H. Hardaway, Sr., and L. H. Hardaway, Jr., are guilty of racial discrimination in the selection of tenants for occupancy of the Dellway Villa apartment complex. In addition to direct, deliberate discrimination, see Resident Advisory Board v. Rizzo, 546 F.2d 126, 147 (3rd Cir. 1977) for a discussion of the required intent.

(3) These defendants violated 42 U.S.C. §1982. Jones v. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), and Sullivan v. Little Hunting Park, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969).

(4) These defendants violated 42 U.S.C. §3604.

Once having determined that the defendants have been guilty of violating the statutes, i.e., 42 U.S.C. §1982 and 42 U.S.C. §3604, et seq., it is necessary to formulate a remedy for such statutory violations. The record in this case amply supports the fact that in the past the defendants Hardaway have had an excellent record in racial matters, that they are accepted by the black community as having contributed substantially in the training and

employment field of disadvantaged blacks, and they have not been charged with racial bias in the operation of other subsidized housing. They have initiated training programs in the contruction industry and have had a close working relationship with black academia. This history assumes some importance in fashioning a remedy to the extent that the violations in the case sub judice do not represent a continuance of previous racial improprieties.

Although tenants for all of the apartments not yet leased have been tentatively selected by defendants, there are still a substantial number available for occupancy. It is the opinion of this court that the initial proper remedy in this case is that all of the 1,622 applications shall be divided according to bedroom requests, i.e., one, two, or three bedrooms. Thereafter each of the three groupings shall be placed in chronological order as to the date of the application. Then site manager Appleton shall classify each application pursuant to the criteria applied to all tenants, using the form setting forth the criteria. A form shall be filled out as to each applicant, determining the eligibility and qualification of each of the 1,622 applicants. A list shall be prepared listing the chronological order for each of the three categories reflecting qualification or nonqualification for tenant occupancy. Attached to each list shall be a copy of the application for each individual and the rating sheet prepared by the applicant. The defendant shall likewise prepare a separate set of documents to be filed with the court which shall include a list of those tenants who now occupy the apartments and those who have tentatively been selected to occupy the apartments listed in the order of the date of their application. Attached to this list shall be a copy of the application of each person and a copy of the rating sheet made at the time of the tenant selection. If no such sheet was made there shall be a notation thereof. These documents shall be provided forthwith and not

later than within twenty (20) days. Thereafter the plaintiffs and their attorney shall submit in writing, including the reasons therefor, any objections to the classification made of the applicants. These objections shall be submitted within fifteen (15) days after the submission by the defendants. Thereafter a hearing will be scheduled to take evidence from the applicants and any other witnesses proferred by the defendants or the plaintiffs concerning the ratings. Pending this determination the defendants are enjoined from leasing any additional apartments to any proposed tenants or otherwise granting occupancy to the unoccupied apartments.

An appropriate order will be entered.

/s/ L. CLURE MORTON
CHIEF JUDGE

AFFIDAVIT OF SERVICE

STATE OF TENNESSEE)
) ss.
COUNTY OF DAVIDSON)

I, William Henry West, attorney for the Respondents-Plaintiffs in this cause, hereby make oath that I personally delivered one copy of the attached Motion for Leave to Proceed In Forma Pauperis, Affidavit in support thereof, and Brief in opposition to Petition for Certiorari to the offices of Mr. Charles W. Bone and Mr. William L. Small, attorneys for Petitioners-Defendants, Bone & Woods, Tenth Floor, United American Bank Building, Nashville, Tennessee 37219, on Friday, February 12, 1982.

FURTHER AFFIANT SAITH NOT.

William Henry West
WILLIAM HENRY WEST

Sworn to and subscribed before me this 12th day of February, 1982

Cheryl L. Schneider
NOTARY PUBLIC

My Commission Expires: 10-17-82

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NO. 81-1349

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DELLWAY VILLA OF TENNESSEE, LTD., et al.,
Petitioners,

v.

CHARLIE MAI JORDAN,
et al.,
Respondents

Motion For Leave To Proceed In Forma Pauperis

Comes now the plaintiff-respondent, Charlie Mai Jordan, and moves this honorable Court to grant her leave to proceed herein in forma pauperis, pursuant to Rule 46 of this Court. Her affidavit in support of this motion is attached hereto. Plaintiff sought, and was granted, leave to proceed in forma pauperis in the District Court and the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

William West

WILLIAM WEST
Attorney for the Plaintiff
LEGAL SERVICES OF MIDDLE TENNESSEE, INC.
1512 Parkway Towers
404 James Robertson Parkway
Nashville, Tennessee 37219

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IN THE

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OCTOBER TERM, 1981

DELLWAY VILLA OF TENNESSEE, LTD., et al.,
Petitioners,

v.

CHARLIE MAI JORDAN,
et al.,
Respondents

Affidavit In Support Of Motion To Proceed
In Forma Pauperis

I, CHARLIE MAI JORDAN, being first duly sworn, depose and say that I am the plaintiff in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding herein are true.

1. Are you presently employed? No. I was last employed in 1970.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, divideents, or other source? No.

3. Do you own any cash or checking or savings account? No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons. I have three children, James, Ebony and Leonard, who live with me and depend on me for their support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Charlie Mai Jordan
CHARLIE MAI JORDAN

SUBSCRIBED AND SWORN TO before me this 5th day of February, 1982.

Neil L. Schneider
NOTARY PUBLIC

My commission expires: 10/17/82